Supreme Court, U. S.
FILED
MAY 8 1978
MICHAEL RODAK, JR., CLERK

No. 76-1799

In the Supreme Court of the United States

OCTOBER TERM, 1977

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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This memorandum supplements a memorandum submitted on behalf of the Federal Power Commission in September 1977 in response to the petition for a writ of certiorari. The statement of the case is set forth more fully in that memorandum.

Briefly, the Commission ruled that a curtailment plan filed by petitioner was unlawful under the Natural Gas Act because it contained compensation provisions whereby customers who received more gas than the system-wide average were required to compensate those who received less than the average. The Commission believed those provisions were unlawful because, in effect, they established rates for certain purchasers that were unrelated to the pipeline's costs of service plus a

reasonable rate of return. Petitioner contended that the provisions were lawful, and sought judicial review of the Commission's order rejecting the plan.

The court of appeals in this case, however, has repeatedly declined to decide the issue of the lawfulness of the compensation scheme, on the ground that it could not determine whether the plan was lawful until the Commission undertook an extensive inquiry and developed "substantial information regarding the duration, shape and causation of the alleged shortage on the Transco system" (Pet. App. A, pp. 12a-13a). The court has remanded the case to the Commission three times for that purpose, notwithstanding that this Court, summarily reversing a prior remand order, directed the court of appeals to give the matter "swift and priority consideration * * *." *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 334-335.

In our memorandum filed in September 1977, we suggested that the Court defer ruling on the petition in this case because another case, also presenting the issue of the lawfulness of such a compensation scheme, was pending before a different panel of the court of appeals. *Elizabethtown Gas Co.* v. *Federal Energy Regulatory Commission*, C.A.D.C., No. 76-1465. In *Elizabethtown*, as in this case, the Commission had rejected proposals to include compensation provisions in interim curtailment plans of a natural gas pipeline company on the ground that it had no authority to require or approve curtailment plans that embodied such compensation provisions. In view of the pendency of *Elizabethtown*, it appeared reasonably likely that the Commission would be able to obtain a ruling from the court of appeals on the lawfulness of such compensation schemes in the reasonably near future.

On January 26, 1978, the court of appeals announced its decision in *Elizabethtown* (Supp. Memorandum of Transcontinental Gas Pipe Line Corp., Appendix). The court held that under the Natural Gas Act, 52 Stat. 821, as amended; 15 U.S.C. 717-717w, the Commission has authority to authorize compensation as part of a curtailment plan. The court adopted the rationale of *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F. 2d 1345 (C.A. 5), certiorari denied, 429 U.S. 870. Without vacating the Commission's orders, it remanded the case to the Commission to decide whether an interim curtailment plan should be adopted. On March 24, 1978, the court of appeals denied a petition by the pipeline for rehearing or clarification. The court stated in pertinent part:

> The opinion and order of this Court requires the Commission to consider whether compensation should be provided. What the Commission has the authority to do on remand is a different question from what it is required to do. The question of authority bears on the relationship between court and agency, *Compare, FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). It has not been considered by the Court previously, and we see no need for "clarification" of a matter that may or may not require a judicial ruling.

The Commission has decided not to seek review by this Court of the decision in *Elizabethtown*. That decision has established in the District of Columbia Circuit, to the Commission's satisfaction, that notwithstanding the Commission's rulings in *Elizabethtown* and this case, the Commission does have authority to approve the inclusion

of compensation schemes in curtailment plans.[1] Accordingly, we believe that there is no reason for further litigation of that issue in this case. Instead, we suggest that the case should be remanded to the Commission so that it may, as in *Elizabethtown*, "consider whether compensation should be provided."

The terms of the remand by the court of appeals in this case restrict the Commission to finding whether an actual shortage of gas supplies exists on the petitioner's system, as a factual predicate for determination by the court of appeals of the question that has now been decided in *Elizabethtown*. We submit that, in view of the decision in *Elizabethtown*, any need for that inquiry has been eliminated and the restriction should therefore be lifted.

We accordingly suggest that the petition for a writ of certiorari in this case should be granted, the order of the court of appeals remanding the record to the Commission for supplementation in accordance with the court's opinion of November 29, 1976, should be vacated, and the case should be remanded with instructions that the court

[1]While the Commission has decided not to seek this Court's review of the decision in *Elizabethtown*, the possibility exists that some other party to that case may do so. The time for petitioning for certiorari in *Elizabethtown* expires on June 22, 1978. (The Commission would oppose any such petition.)

of appeals return it to the Commission for the Commission to determine whether to authorize for the petitioner's system a curtailment plan with a compensation feature.[2]

Respectfully submitted,

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MAY 1978.

[2]Petitioner, in its supplemental memorandum, requests that the case be remanded to the court of appeals "with directions to decide this case promptly on its merits" (Supp. Mem. 5). Since the court of appeals in *Elizabethtown* has decided the merits of the Commission's authority to approve compensation schemes, and since the Commission accepts that decision, we see no need to have the issue decided in this case as well.

DOJ-1978-05